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No. 76-1219

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANDREW G. GRUTKA, BISHOP OF THE CATHOLIC DIOCESE OF GARY, INDIANA, PETITIONER

v.

ALEX V. BARBOUR,
REGIONAL DIRECTOR OF THE THIRTEENTH REGION,
NATIONAL LABOR RELATIONS BOARD
and
LAY TEACHERS FEDERATION OF THE GARY DIOCESE,
LOCAL 3493

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A8- A15) and the district court (Pet. App. A1-A7) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1977. The petition for a writ of certiorari was filed on March 2, 1977. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a district court may enjoin National Labor Relations Board representation and unfair labor practice proceedings, where the procedures established by the National Labor Relations Act provide an adequate method for review of petitioner's contentions and have not been exhausted.

STATEMENT

In October 1975 the Lay Teachers Federation of Gary Diocese, Local 3493, American Federation of Teachers (the Union), filed a petition with the National Labor Relations Board seeking a representation election among a unit of lay teachers employed by the Catholic Diocese of Gary, Indiana, in its elementary and high schools. After a hearing, the Board's Regional Director, Alex V. Barbour, scheduled a representation election for October 7, 1976 (Pet. App. A8-A9).

In May 1976 the president of the Union filed an unfair labor practice charge with the Board, alleging that petitioner, the Bishop of the Diocese, had discharged him because of his union activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), and that petitioner had taken other actions in violation of Section 8(a)(1) of that Act. Regional Director Barbour issued an unfair labor practice complaint on the basis of these charges (Pet. App. A9). An administrative law judge heard evidence concerning this complaint on September 21, 1976 (*ibid.*).

On September 16, 1976, petitioner filed a complaint in the United States District Court for the Northern District of Indiana. Petitioner sought to enjoin the Regional Director from proceeding with the election and the unfair labor practice hearing, and asked that the National Labor

Relations Act be declared unconstitutional as applied to sectarian schools. On October 5, 1976, the district court issued its decision, which permitted the Regional Director to conduct the election but enjoined him from counting the ballots or from taking any other action in the representation and unfair labor practice proceedings until after the United States Court of Appeals for the Seventh Circuit had decided *Catholic Bishop of Chicago* v. *National Labor Relations Board*, No. 76-1600, a case involving constitutional issues identical to those raised by petitioner (Pet. App. A1-A7). The district court did not find that petitioner probably would succeed on the merits.

On February 2, 1977, the court of appeals vacated the district court's injunction and directed it to dismiss the action. The court of appeals held that petitioner should have exhausted his administrative remedies before the Board, and that the constitutional allegations of petitioner's complaint did not warrant an exception to that rule "because the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights" (Pet. App. A14). The court ordered that its mandate issue forthwith. On February 25, 1977, Mr. Justice Stevens denied petitioner's application for a stay.

On February 7, 1977, the district court dismissed the complaint, thereby permitting a tally of the ballots cast in the Board election; the tally disclosed that the Union had failed to receive a majority of the votes. The Union filed objections to the election, which were consolidated with the unfair labor practice complaint. A further hearing on these objections and the unfair labor practice complaint was held on March 14 and 15, 1977. The administrative law judge now is considering his decision.

ARGUMENT

1. Ordinarily district courts do not have jurisdiction to enjoin the Board from conducting representation or unfair

labor practice proceedings, because judicial review of Board action may be had only in the court of appeals following issuance of a final order in an unfair labor practice proceeding. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-479; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-49. Such review affords "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Myers, supra*, 303 U.S. at 48. "[U]ntil the Board's order has been affirmed by the appropriate * * * Court of Appeals, no penalty accrues for disobeying it," and "all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of *constitutional right or statutory authority*, are open to examination by the court." *Id.* at 48-49; emphasis added.

The procedures leading to judicial review in the ordinary course do not themselves violate petitioner's rights, and thus there is no reason to permit injunctive action in the district court. At most, petitioner might be subject in the interim to a Board order to bargain with the Union as the representative of the Diocese's lay teachers, to refrain from restraining or coercing employees in the exercise of their right to engage in union activity, and to reinstate with backpay the employee alleged to have been discharged for engaging in union activity. But such an order may never issue, and if it does not issue there will be no need to resolve the First Amendment issue petitioner seeks to present.[1]

Even if the Board should issue an order, petitioner would not be required to comply until it had been enforced by a

[1]The Union lost the election, and a bargaining order could not issue unless the Union's objections are sustained and it is ultimately able to establish that it has the support of a majority of the unit employees. Petitioner has resisted the unfair labor practice charges; petitioner contends that the Diocese engaged only in permissible persuasion, and that no employee has been discharged because of activity on behalf of the Union.

court of appeals; petitioner would have a full opportunity to present to that court his constitutional reasons why the order should not be enforced. The statutory procedure thus affords petitioner an adequate means to obtain judicial review of his contentions.[2]

2. The constitutional basis for petitioner's attack on the Board's authority does not justify bypassing the ordinary course of exhaustion of administrative remedies and review (if that should be necessary) in the court of appeals. As the Court stated in *Myers* v. *Bethlehem Shipbuilding Corp., supra*, 303 U.S. at 50-51, the exhaustion requirement applies to constitutional questions no less than to other types of questions.[3]

It is particularly appropriate that the constitutional questions sought to be raised by petitioner be resolved after, rather than before, the Board proceedings have been completed. As the court of appeals pointed out (Pet. App. A12):

[2]The statutory procedure has been followed in other cases involving First Amendment issues. See *Catholic Bishop of Chicago* v. *National Labor Relations Board, supra; Diocese of Fort Wayne-South Bend* v. *National Labor Relations Board*, petition for review pending, C.A. 7, No. 76-1638; *Cardinal Timothy Manning* v. *National Labor Relations Board*, petition for review pending, C.A. 9, No. 77-1286.

[3]The cases upon which petitioner relies (Pet. 10) for a contrary rule do not involve the National Labor Relations Act. In *Weinberger* v. *Salfi*, 422 U.S. 749, for example, the Court held only that review of certain decisions in welfare cases was authorized by 42 U.S.C. 405(g). Cf. *Califano* v. *Sanders*, No. 75-1443, decided February 23, 1977, slip op. 8-10, which holds that Congress has precluded judicial review of other decisions in welfare cases and observes that courts must honor congressional decisions establishing particular courts and times for judicial review. That is what Congress has done here by designating the court of appeals as the proper forum for review of the Board's decisions. In *Salfi* and in *Mathews* v. *Diaz*, 426 U.S. 67, by contrast, if there was no review in the district courts, there was no judicial review at all.

> In the religious area, the essence of First Amendment inquiry is entanglement, *i.e.*, whether the involvement of the state has improperly established religion or impermissibly interfered with the free exercise of a religious belief. * * * But the nature and scope of the state entanglement attacked can only be measured against a factual record delineating the character of entanglement which assertedly arises from the state intrusion. * * *

In short, without a record indicating what conduct on the part of petitioner is found to violate the Act and what remedial actions, if any, the Board will require petitioner to take, petitioner's allegations of constitutional infringement cannot properly be assessed.[4]

3. *Leedom* v. *Kyne*, 358 U.S. 184, does not assist petitioner. *Kyne* held that district courts may entertain a challenge to Board action that is admittedly contrary to a specific mandatory prohibition in the Act where there is no other

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[4]Petitioner asserts that irreparable harm to a religious institution should be "presumed from the very fact of the first assertion by government over that which lies at the very heart of its religious mission" (Pet. 11). But "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Reynolds* v. *United States*, 98 U.S. 145, 166. See also *Braunfeld* v. *Brown*, 366 U.S. 599, 603-604. The mere assertion of jurisdiction by the Board in no way infringes petitioner's freedom to hold any religious belief, and whether the Board will restrict petitioner's conduct cannot be determined until the completion of the Board proceedings.

Petitioner's allegations (Pet. 10-11) regarding the Board's lack of specialized competence in the areas of constitutional law and religion do not justify petitioner's attempt to circumvent the exhaustion requirement. The assertion of constitutional claims "constitutes a strong reason for *not* allowing" anticipatory judicial intervention, since the administrative determination may eliminate the necessity of deciding the constitutional question. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772; emphasis added.

adequate method of obtaining judicial review of that action. As the court of appeals stated, "[u]nlike *Kyne*, this case presents no patent disregard by the Board of the bounds of its statutory jurisdiction" (Pet. App. A11). Petitioner's First Amendment claims raise factual issues regarding the extent of church-state "entanglement" which may or may not result from the Board's assertion of jurisdiction. Moreover, the absence of power in the district court does not preclude petitioner from litigating his constitutional claims; it means only that petitioner must do so in the statutorily prescribed manner.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]*McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, is a case in which judicial intervention was justified only because actions taken by the Board "created international problems for our Government." *Id.* at 16-17. No such extraordinary circumstances are present here.